Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 93-36
Nondominant Common Carriers	)	

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES ON NOTICE OF PROPOSED RULEMAKING

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Dated: April 19, 1993

SUMMARY

The Association for Local Telecommunications Services ("ALTS") strongly supports the Commission's proposed tariffing requirements for nondominant carriers. As the Commission has noted, liberalized regulatory treatment of nondominant carriers is justified by the market discipline to which they are subject. A nondominant carrier that attempts to price its services anticompetitively will find that its customers simply go elsewhere. The LECs, on the other hand, have sufficient market power that they can discriminate among customers and cross-subsidize their competitive services with monopoly revenues. The Commission thus appropriately concentrates its regulatory review on the LECs.

LEC requests to extend maximum streamlined regulation to themselves are unresponsive to the Commission's rulemaking. They also fail on their merits. The LECs still dominate the vast majority of the market for access services and have ample opportunity to cross-subsidize any competitive services with monopoly revenues. MFS thus urges the Commission to reject summarily requests for regulatory parity as inimical to the public interest.

Finally, the Communications Act authorizes the specific tariffing requirements for nondominant carriers proposed in the NPRM. The Communications Act supplys the general outlines of the tariffing requirements and leaves the Commission broad authority to supply the detail through its regulations. Further, the Commission has wide latitude to modify the Act's requirements or its own regulations for good cause shown. In the instant case, the Commission's proposed regulations easily satisfy that

test since they supply needed flexibility to nondominant carriers, thereby bringing increased competition to the marketplace.

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The Association for Local Telecommunications Services ("ALTS"), a non-profit national trade organization representing providers of competitive access services ("CAPs"), hereby submits its reply to comments filed pursuant to the Notice of Proposed Rulemaking ("NPRM") released in the above-referenced proceeding on February 19, 1992.

I. INTRODUCTION

In AT&T v. FCC,[1] the United States Court of Appeals for the District of Columbia Circuit held unlawful the Commission's permissive detariffing rules for nondominant carriers (known as the Commission's "forbearance policy"). The

[1] AT&T v. FCC, 978 F.2d 727 (D.C. Cir.), *rehearing en banc denied*, Jan. 21, 1993. This decision became effective on March 9, 1993, when the mandate was issued.

Commission adopted its forbearance policy in the Competitive Carrier Rulemaking,[2] reasoning that nondominant carriers need not file tariffs because market discipline would force them to price their services competitively. The Commission concluded that dominant carriers, in contrast, have market power that gives them the ability, as well as the incentive, to discriminate among customers and to cross-subsidize their competitive services with monopoly revenues.

In assessing the effects of its long-standing forbearance policy, the Commission has properly concluded that its forbearance policy played a substantial role in the development of competition in the marketplace. NPRM at 5-6, paras. 10-11. By not saddling nondominant carriers with the burdens and costs of full tariffing, providers of a wide variety of competitive communications services began to flourish, bringing the benefits of increased competition to the public.

The policy underpinnings of the Commission's forbearance policy, and its success in increasing competitive market pressures, were not called into question by AT&T v. FCC. Rather, the D.C. Circuit held that, under the Communications Act, the Commission lacked authority to exempt entirely some carriers from filing tariffs. Given, however, that the basis for the Commission's forbearance rules still strongly supports reducing the regulatory burden on nondominant carriers, ALTS urges the adoption without modification of the tariffing rules proposed in the NPRM, which would apply

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[2] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59 (1982); id., Fourth Report and Order, 95 F.C.C.2d 554 (1983) ("Competitive Carrier Rulemaking").

"maximum streamlined regulation" to nondominant carriers.[3] By this action, the Commission would comply with AT&T v. FCC, but would allow nondominant carriers greater regulatory flexibility and secure for the public the benefits of greater competition. ALTS notes, however, that even a streamlined tariffing requirement will tend to slow the pace of innovation and place a significant regulatory burden on nondominant carriers. Because market forces already ensure that the rates charged by nondominant carriers will be just and reasonable, ALTS additionally urges the Commission to seek reinstatement of its forbearance policy through judicial review and/or congressional codification.[4]

II. LEC REQUESTS TO EXTEND "MAXIMUM STREAMLINED REGULATION" TO DOMINANT CARRIERS ARE MERITLESS, AS WELL AS PROCEDURALLY IMPROPER

Several local exchange carriers ("LECs") readily concede that the tariff rules proposed in the NPRM provide the Commission with sufficient regulatory oversight of competitive carriers and furthermore are in full conformity with the Communications

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[3] "Maximum streamlined regulation" refers generally to regulation that permits tariffs to take effect on no less than one day's notice and to be filed without cost support. See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5881 (1991) ("AT&T Competition Order"), recon. in part, 6 FCC Rcd 7569 (1991); further recon. 7 FCC Rcd 2677 (1992). In the NPRM, the Commission also proposes additional tariff flexibility for nondominant carriers, including permitting these carriers to file tariffs containing either maximum rates or a range of rates. NPRM at 9-10, at para. 22.

[4] See also MFS at 3-7; NCTA at 4.

Act. These LECs argue that they also should be subject to such liberalized regulation.[5] As ALTS discusses below, such arguments for LEC regulatory relief are procedurally defective and are inimical to the public interest, and so must be rejected.

A. The LEC Requests for Regulatory Parity Are Procedurally Improper

The LECs seek to use the instant proceeding as a vehicle to deregulate themselves, arguing that they are no longer dominant carriers. Although ALTS demonstrates infra that this assertion is clearly incorrect,[6] the instant proceeding is in any case an inappropriate place to address the LECs' contention.

The Commission asked in its NPRM for comments relating to the proper tariffing requirements for nondominant carriers, not for comments on which entities should be classified as nondominant. That question was expressly addressed by the Commission in the Competitive Carrier Rulemaking, which found that the LECs are dominant carriers, whose tariffs should be subject to stringent review.[7] If the LECs seek to challenge this finding, then they must employ a proceeding other than the instant one, which is designed solely to examine the propriety of subjecting carriers already classified as nondominant to a liberalized regulatory regime. Because such arguments are not responsive to the NPRM, they merit summary dismissal.

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[5] See, e.g., BellSouth at 8; Southwestern Bell at 17; see also Ameritech at 3 (advocating streamlined regulation for all carriers, but choosing not to address the Commission's legal authority to allow carriers to file a maximum rate or a range of rates).

[6] See infra.

[7] Competitive Carrier Rulemaking, First Report and Order, 85 F.C.C.2d 1 (1980)

B. The Public Interest Compels Rejection of the LEC Requests for Streamlined Regulation

Even if the LEC requests were procedurally cognizable, the contention of the LECs that their services are competitive and do not merit full regulatory scrutiny is grossly inaccurate. The LEC thus properly recognize that the Commission should focus its regulatory efforts on carriers that are unsusceptible to market pressures, not on those for whom the market dictates a price. Where the arguments of the LECs go awry, however, is in their unsubstantiated assertion that LECs no longer exercise sufficient market power to merit stringent review of their tariffs.

The LECs clearly are dominant carriers. As a variety of sources reveal, LECs control over 99% of the total market for special and switched services. According to one study of the local access market, for example, the revenue generated by the CAPs is approximately $260 million in a total market of approximately $90 billion.[9/] The Chairman of AT&T reiterated this conclusion in testimony before Congress, citing AT&T statistics demonstrating that it pays $14 billion in access charges to LECs but only $19 million to CAPs.[9/]

Perhaps recognizing the incontrovertibility of these figures, some LECs suggest that even if they currently could be considered dominant, that the Commission's Collocation Order[10/] will lead instantaneously to a perfectly competitive marketplace,

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[9/] Connecticut Research, 1992 Alternate Local Transport . . . A Total Industry Report 36 (1992).

[9/] "Communications Daily," Mar. 25, 1993, at 1.

[10/] Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 (1992).

which the LECs cannot control.[11/] Nothing could be further from the truth. First, as

ALTS and a number of other commentators have stated in comments to the

proposed under the Commission's NPRM satisfy this requirement -- they minimize the administrative burden and expense of the tariffing process on nondominant carriers, but still satisfy the fundamental dictates of the Act.

A. The Commission Should Adopt a One Day Notice Period for Nondominant Carrier Tariffs

While the NPRM proposes to allow nondominant carriers to file their tariffs on a minimum of one day's notice, NYNEX contends that such a notice period is contrary to the public interest and that the Commission accordingly should reject it.[12/]

Section 203(b)(2) specifically provides the Commission with the authority, in its discretion and "for good cause shown," to modify the tariff notice provision so long as the notice period is not specified to be more than 120 days. Here, the Commission appropriately exercised that authority, underscoring that for nondominant carriers a 14 day notice period would provide no useful purpose. As the Commission recognized, competitive market pressures already ensure that the rates and terms and conditions in a nondominant carrier's tariff must be reasonable -- if they are not, customers will simply purchase service from another provider, such as dominant LEC. An empirical example of how effectively the market works is seen in the Commission's experience with current nondominant tariff filings: it has not once found it necessary to conduct a preeffective review of a nondominant carrier's rates. Moreover, a Section 208 complaint offers adequate opportunity for interested parties to challenge a nondominant carrier's tariff.

[12/] NYNEX at 8-11. See also Sprint at 3-4.

A one day notice period also allows CAPs and other nondominant carriers maximum flexibility to respond rapidly to developments in the marketplace. LECs have been pioneers in providing customers with new services, such as the redundant fiber-based networks. A one day notice period would help sustain this innovation and ensure the continued development of new telecommunications technology.

Maximum streamlined regulation is also justified by the dangers that prolonged pre-effective review for nondominant carriers presents. In particular, pre-effective review would allow LECs to engage in nuisance litigation that will profoundly disadvantage competitive carriers. In its initial comments, ALTS chronicled the Bell Atlantic opposition to the tariffs of five ALTS members. That opposition is entirely meritless[13/] and appears intended merely to harass the CAPs and to force them to incur legal fees in defending their filings. Since that filing, NYNEX has filed equally meritless petitions, attacking the tariffs of three ALTS members. Both of these examples presage the strong-arm tactics likely to be embraced by other LECs. The incentive, of course, is that LECs' litigation costs are included in their rate bases and are recovered through their monopoly service rates. Nondominant carriers, in contrast, must pay these costs directly out of their profits. Clearly, the LECs have the incentive and ability to abuse the tariff review process and to impose enormous litigation costs upon CAPs, with no risk to their own profitability. The LECs'

[13/] In fact, Bell Atlantic's own subsidiary, Bell Atlantic Mobile Systems, Inc., filed a tariff in which four of its six rate schedules establish a minimum rate of zero.

demonstrated ability to use the tariff review process to such anticompetitive effect is perhaps the strongest argument for adopting the NPRM's one day notice requirement.

B. The Commission Should Adopt Its Proposal to Allow Nondominant Carriers to File Maximum Rates or a Range of Rates

The Commission proposes to provide nondominant carriers with maximum rate flexibility by permitting them to file either a maximum rate or a range of rates. NPRM at 9, para. 21. This proposal will reduce the frequency with which nondominant carriers must file tariff revisions (each of which entails a $490 filing fee) and will minimize the burden on the Commission in monitoring and enforcing compliance with unnecessary regulations.

Several LECs contend, however, that under the authority of Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 376 (D.C. Cir. 1986) -- a case involving the interpretation of the Interstate Commerce Act ("ICA") -- the Commission may not allow carriers to file maximum rates or a range of rates.[14/] Such rote application of an ICA case to the interpretation of a provision of the Communications Act completely ignores the admonition of the Second Circuit Court of Appeals, which has warned that the interpretation of the provisions of the two acts, and the authority of the two commissions, substantially differs. See AT&T v. FCC, 503 F.2d 612, 617 (2d Cir. 1974). In the instant case, the Commission has complied scrupulously with the language of the Act and seeks only, and with good cause, to modify its own regulations. These regulations were originally adopted to ensure

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[14/] See, e.g., Nevada Bell and Pacific Bell at 15.

stringent scrutiny of a monopoly market. If applied to nondominant carriers, however, they would unnecessarily impede the development of a competitive marketplace.

Section 203 provides that a carrier file "schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges."[15] A listing of the maximum rate or a range of rates for a carrier's services satisfies the minimal standard that the carrier file a "schedule" of charges. The Commission thus does not seek to eliminate the requirements of the Act -- instead, its tariffing proposal strictly adheres to the Act's language.

The Commission in essence seeks to modify its own regulations, which currently require considerable rate detail in a tariff. The Commission's authority to modify its own regulations is incontrovertible. In Section 203(b)(2), the Communications Act provides that the Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of Section 203.[16] This Section, as interpreted by the courts, authorizes the Commission to "modify requirements as to the form of, and information contained in, tariffs," although the Commission may not to eliminate these requirements wholesale.[17]

The Commission accordingly proposes to modify its tariff regulations for nondominant carriers to give such carriers express permission to file a maximum rate

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[15] 47 U.S.C. § 203(a).

[16] 47 U.S.C. § 203(b)(2).

[17] AT&T v. FCC, 503 F.2d 612, 617 (1971).

or a range of rates. Such a proposal is clearly justified by the public interest. As demonstrated in detail above, the Commission quite properly requires that dominant carriers file a detailed schedule of charges from which a customer or the Commission can calculate the precise rate for each of the carrier's services. This enables the Commission to determine whether a particular carrier is engaging in anticompetitive activities, such as cross-subsidization. For nondominant carriers, however, a maximum rate or range of rates gives the Commission adequate information since the market itself guards against anticompetitive activities. Devotion of additional Commission resources to nondominant carrier regulation in these circumstances would be patently unreasonable. ALTS accordingly strongly urges the Commission to allow nondominant carriers to file a maximum rate or a range of rates.

C. The Commission Should Adopt Its Proposal to Allow Nondominant Carriers a Streamlined Tariff Filing Process

ALTS supports the Commission's efforts to simplify the tariff filing process by (i) permitting nondominant carriers to file tariffs and updates on floppy disks, (ii) providing carriers flexibility in indicating material that is new or changed, (iii) eliminating formalities governing the form of the transmittal letter accompanying the tariffs, and (iv) permitting carriers to adopt their own methods of classifying their services and practices. These provisions provide nondominant carriers with maximum flexibility in defining their services and terms and conditions, and thus free such carriers from revising their tariffs each time they slightly adjust a service offering to suit a particular customer's needs. The reduced frequency of tariff filings will ease the administrative and financial burden on CAPs and other nondominant carriers. Furthermore, the filing

of floppy disks will preserve storage space at the Commission and will facilitate their easy access.

IV. CONCLUSION

For the foregoing reasons, ALTS urges that the Commission adopt its proposed rules and reject all arguments to the contrary. At the same time, given the demonstrated benefits that have resulted over the last decade in which the Commission's forbearance policy was in effect, ALTS urges the Commission to vigorously pursue all available judicial and legislative action (including appeal of AT&T v. FCC and amendment of the Communications Act) to reinstate its forbearance policy.

Respectfully submitted,

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Dated: April 19, 1993

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CERTIFICATE OF SERVICE

I hereby certify that on 19th day of April, 1993, the foregoing REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES ON NOTICE OF PROPOSED RULEMAKING documents were served via hand-delivery on the following individuals:

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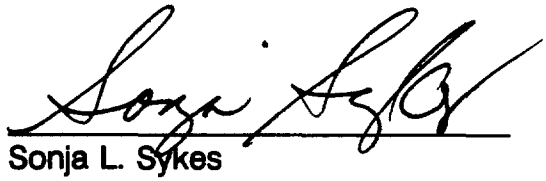

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